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Senate Commerce, Science and Transportation Committee
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Thank you for inviting me to testify at this oversight hearing on the operations and activities of the FCC's Common Carrier Bureau. While I have some fairly pointed criticisms to offer today regarding the operations and recent activities of the Bureau, I start from the perspective that the Common Carrier Bureau is an extraordinary assemblage of talented and devoted professionals who serve their country with honor and distinction.

Having spent more than half of my career as a public servant, and half of those years at the Common Carrier Bureau, I know how easy it is to beat up on government agencies. And old regulators like myself neither disappear nor fade away; they linger on the sidelines to snipe. So let me stress that my comments are intended as constructive criticism of the organization and substance of the Bureau's work, and are in no way intended as personal criticism of the dedicated public servants who labor there. Let me also state that the views I express today are mine alone.

My first and most substantive comment concerns the general direction of the Commission. I believe that in the last several years there has been a significant shift in the way the Commission perceives its role and in the way it approaches the matters before it. The FCC was designed sixty-four years ago as an arm's-length, independent

regulatory agency, inherently bipartisan by virtue of its statutory structure, and primarily responsible to Congress. Through most of its history, the FCC operated in a manner consistent with this model.

In the 1980s, the FCC pursued deregulation initiatives in an environment marked by no clear statutory mandate, a lack of commitment or outright opposition to competition from a majority of state commissions, and open hostility from almost all of the rest of the world for the U.S. approach.

Today, in contrast, an overwhelming bipartisan majority has enacted a statutory mandate for deregulation and competition. Most, if not all, states lead the FCC in opening and deregulating markets. And the global regulatory framework is firmly predicated on a pro-competitive model.

Despite these positive -- indeed, wonderful -- changes in conditions, the current FCC has been regulating more, not less, and growing its bureaucracy. It is not always clear which of these is the cause of the other. In addition, the Commission has failed to follow the clear mandate of Congress in the most important area remaining with the jurisdiction of the Common Carrier Bureau: universal service.

As I see it, the Common Carrier Bureau today has three primary functions: (1) the development and management of federal universal service support mechanisms; (2) opening of new competitive opportunities in telecommunications service markets, the most important of which is the authorization of Bell company entry into the interstate long distance market; and (3) enforcement of the common carrier provisions of the

Communications Act and the Commission's rules. The most important of these is universal service. However, the Commission's implementation of Section 254 of the Telecommunications Act of 1996 (the "Telecom Act"), governing universal service, is perhaps the best example of the disconnect between Congressional intent and FCC actions.

Universal Service Reform

This coming Friday, May 8, l998, marks the one-year anniversary of the deadline Congress set for implementation of the new universal service system. Yet all of the core issues remain undecided.

Congress directed the FCC to establish a new universal service system that will be compatible with a competitive environment with multiple local exchange carriers ("LECs") and based to the extent possible on explicit rather than implicit subsidies. Congress gave the Commission 15 months to complete this admittedly daunting task. It also mandated the creation of a program of subsidies for schools and libraries. The 15-month deadline was last May 8, 1997. On that date, the FCC adopted a definition of the services to be supported by federal universal service support mechanisms and a timetable for implementation, but deferred decisions on virtually every core issue that must be resolved before the new system can be implemented. The Commission did, however, establish an elaborate mechanism -- including the creation of two new corporations -- to distribute subsidies to schools and libraries.

In my opinion, this is an example of the Commission heeding its own priorities,

and those of the Administration, instead of the directives of Congress as embodied in law. With respect to Section 254, the Commission's and the Administration's top priority has been the schools and libraries component. The Commission has accordingly devoted considerable resources and decision-making time to implementing that component, to the detriment of the broader reform of the universal service system that was a clear priority of Congress.

The FCC's stated intention is to adopt the rules necessary to implement the new universal service system by the end of August, l998, with the new system taking effect January 1, 1999. It troubles me that three months before it intends finally to adopt the new rules, the Commission has yet to release a set of proposed rules for comment. Given the phenomenal complexity of the issues involved, and the susceptibility of any universal service system that is competitively and technologically neutral to fraud and abuse by "bad actors," the new system should be subjected to public scrutiny and tested in the marketplace of ideas before it is entrenched in the Commission's rules.

Some of the decisions the Commission *has* made regarding universal service support also trouble me. For instance, the Commission decided last May to limit the federal share of universal service costs to 25 percent of the total relevant costs, leaving the states responsible for the remaining 75 percent. The Commission presented this as a continuation of existing policy, citing the fact that under current FCC separations rules, 25 percent of loop plant costs generally are allocated to the interstate jurisdiction. This ignores a fact of obvious relevance in a universal service context: under the

current rules, a far greater proportion of loop plant costs of LECs that operate in "high-cost" areas -- sometimes in excess of 80 percent -- are allocated to the interstate jurisdiction. Whatever the merits of the Commission's new policy, it is a radical departure from the *status quo*, and the Commission's justification of it is an example of "spin" at the expense of reasoned rulemaking.

Market Entry

The second core function of the Common Carrier Bureau is to open new competitive opportunities in telecommunications markets. Obviously, the most important market entry issue before the Bureau is the authorization of Bell Company entry into in-region interLATA long distance service markets pursuant to Section 271 of the Communications Act. Unfortunately, there is also a disconnect between what Congress intended in adopting Section 271 and what the Commission has done. It has now been two years and three months since Section 271 became law. Yet not one Bell Company has received Section 271 authorization in any state.

In the deliberations leading up to passage of the Telecom Act, Congress considered and rejected approaches to Bell company entry that would have required the Bell companies to wait even six months before seeking permission to enter the in-region long distance markets. This is strong evidence that Congress did not expect or want the Bell companies to continue to be excluded from these markets for as much as two additional years. Yet that is exactly what has occurred as a result of the Commission's rejection of all 271 applications it has received.

The Bell companies continue to be excluded from the interstate long distance market despite the presence in their local service markets of effective, facilities-based competitors. Across the country, the Bell companies are confronting intense competition from alternative providers that offer discounts of 20% or more off the Bell companies' local service rates. Even greater reductions are available to customers

who sign up for "bundled" local and long distance services -- a product package that no Bell company has the right to offer anywhere in the United States. Coincidentally, two facilities-based competitors to Bell Atlantic recently submitted bids to my law firm to serve as our LEC, and last week we switched half our local lines to one of these alternative providers.

In contrast to the intensifying degree of competition in the local services market, little additional competition has developed over the last two years in the domestic and U.S. international long distance service market. The principal reason is that the carriers best positioned to bring competition to this market -- the Bell companies -- continue to be shut out of it. In my opinion, there is no justification for the Commission to continue to refuse to do the one thing that is certain to increase competition and consumer welfare in the long distance market. The Commission can and should permit their entry in a manner that promotes competition in all telecommunications markets.

Enforcement

The third core function of the Common Carrier Bureau is enforcement, one that the Commission repeatedly has stated is growing in importance. Unfortunately, the Bureau's enforcement performance has been inadequate. Despite statutory provisions that require the Commission to resolve formal complaints within 12 months (or 15 months for cases deemed "complex"), a significant portion of complaints remain unresolved for much, much longer periods.

Similarly, the Bureau's informal complaints process is equally backlogged. The only thing the Bureau does when it first receives an informal complaint is forward it to the carrier that is the subject of the complaint. Yet the Bureau currently has a backlog of 28,000 complaints that have yet to be entered into its computer log before being forwarded to a carrier. Approximately two months elapse between the time the FCC receives an informal complaint and the first time an FCC staffer looks at it.

A serious enforcement problem also exists with respect to the Commission's rules governing the provision of international telecommunications services in the United States. These rules are now the primary responsibility of the International Bureau, but they deserve to be mentioned. The fact is that a number of international carriers, representing a significant minority share of the U.S. international services market, are flagrantly and willfully violating FCC rules, including the Commission's international settlements policy and its rules governing the use of resold international private lines and the provision of call-back services. While some of these rules are questionable, the Commission should enforce them as long as they are on the books. The fact is that the Commission is aware of widespread violations of these rules, but has taken no action against the violators. Indeed, the Commission has apparently decided to turn a "blind eye" to activities -- such as illegal call-back services -- where it deems that they might further other policy objectives.

The result is that the U.S. is developing a worldwide reputation as a haven for international telecommunications scofflaws and pirates. In addition, those U.S.

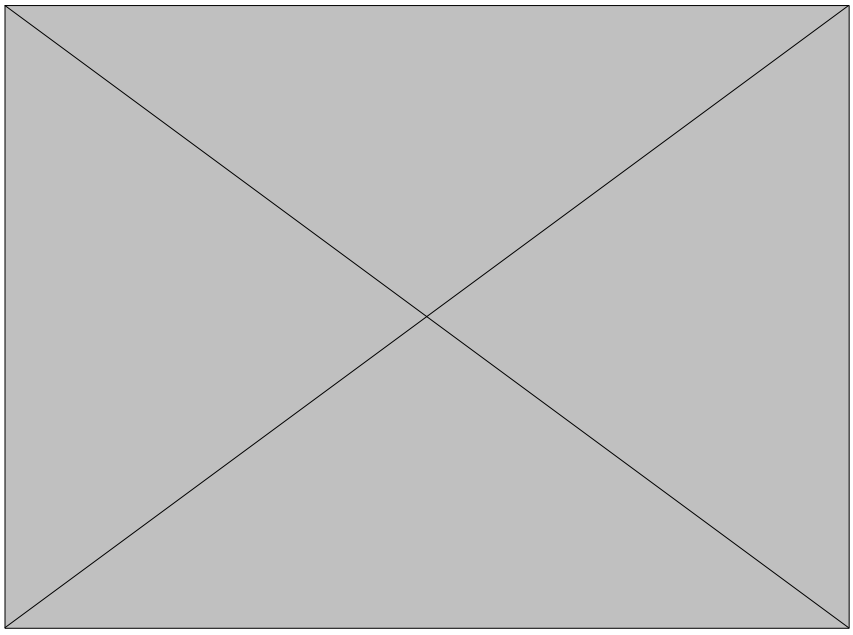
international carriers that do comply with the Commission's rules are placed at a competitive disadvantage relative to the lawbreakers.

Conclusion

The Commission certainly cannot attribute the shortcomings of its enforcement or other functions to a lack of resources. In 1994, the Commission restructured its bureaus, spinning off large parts of the Common Carrier Bureau to two new Bureaus, the Wireless Telecommunications Bureau and the International Bureau. The result was a significant reduction in the scope of the Common Carrier Bureau's responsibilities. In addition, traditional functions of the bureau, including tariff review and authorization of Section 214 applications, have been greatly diminished or eliminated. Yet more resources are dedicated to common carrier activities, and the Bureau itself has more personnel, than ever before.

Implementation of the Telecom Act has been a resource-intensive activity, but it cannot explain the growth of the Bureau and its supporting Commission resources. As shown in Table 1, in 1984, 314 actual work years were performed in the Common Carrier Bureau, and a total of 340 work years were performed across the entire Commission on common carrier activities. Of these, 156 work years were devoted to "authorization of service" activities. In 1997, actual work years performed in the Common Carrier Bureau totaled 345, and across the entire Commission, a total of 471 work years were performed on common carrier activities. Of these, only two work years

were devoted to service authorizations.



Thus, in 1997 there were two and half times more personnel engaged in common carrier activities -- other than service authorization -- than in 1984. This enormous growth in the Commission's common carrier rulemaking bureaucracy cannot be squared with Congress' express will to reduce or eliminate regulation of telecommunications services and operators wherever possible. Instead, it is indicative of a Commission motivated by the traditional imperative of bureaucratic organizations, to perpetuate and expand itself. And as long as there are a lot of regulators, there will be a lot of regulation.